Yuny-Li Home Care Sdn Bhd v Mohan Raj Ratnam & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–22–124 OF 1991
SURIYADI J
31 JULY 2009

Contract — Sale and purchase of land — Agreement — Breach — Agreement subject to undertaking that defendants would obtain consent of Perbadanan Kemajuan Negeri Selangor ('PKNS') — Approval not granted — Whether agreement valid — Whether undertaking subsisted after PKNS rejected transfer — Whether undertaking absolute and unqualified — Whether specific performance or damages would be more appropriate remedy

On 30 January 1986, the Malaysian Association of Productivity ('MAP') purchased a piece of land situated in Section SS 6 ('the land') from the Perbadanan Kemajuan Negeri Selangor ('PKNS'). At the time of the sale MAP and PKNS agreed that the state's authority was required for any subsequent transfer of the land. Thereafter MAP entered into a sale and purchase agreement ('SPA') to sell the land to the plaintiff, a company that provides nursing care, at a price of RM503,569. The agreement included an undertaking that MAP would obtain the consent of PKNS for the transfer of the land to the plaintiff. In fact prior to the signing of the SPA, MAP and the plaintiff had executed a letter of offer prepared by MAP's estate agent ('the vendor's agent') that stipulated, inter alia, that approval for the sale was required from PKNS. In addition, when the plaintiff made part payment of the 10% deposit the vendor's agent issued to the plaintiff a receipt which included the clause 'subject to PKNS approval and the execution of the SPA'. Subsequently MAP wrote to the plaintiff stating that PKNS had not approved the transfer of the land to the plaintiff and that the deal between the plaintiff and MAP was officially terminated. This termination was rejected by the plaintiff, which then gave notice that MAP must exhaust all remedies available to it to fulfil its undertaking. Despite several appeals by the plaintiff and the vendor's agent against the decision by PKNS, the latter did not change its decision. At the same time the plaintiff learned that PKNS had approved the transfer of the land to Angkasa on condition that the land was for institutional purposes only. The plaintiff then filed the present suit against the office-bearers of MAP as defendants pursuant to s 9(c) of the Societies Act 1966. The plaintiff prayed for specific performance and/or damages and injunction. In their defence the defendants averred that the SPA was a conditional contract with consent for the sale/transfer at the sole and absolute

discretion of PKNS and that it was futile to appeal to PKNS. The defendants further submitted that the SPA was void because it was allegedly prepared by an unauthorised person and that the addendum to the SPA was also void and that MAP merely undertook to apply for consent. The plaintiff also applied for and was granted an interim injunction restraining MAP from dealing with the land pending the disposal of the civil suit. During the trial the director of the plaintiff testified that the vendor's agent had orally represented to her that the consent in principle had already been obtained from PKNS to sell the land to the plaintiff to set up a nursing home and that the written consent from PKNS was only a matter of formality. On the other hand the defendants' witnesses denied having represented that MAP had already obtained the approval of PKNS in principle pertaining to the sale of the land to the plaintiff. However, the vendor's agent was not called to testify about that representation to the plaintiff's director and the defendants submitted that the vendor's agent had become the plaintiff's agent after the determination of the SPA. The issues before the court in this case were whether the SPA was valid and if valid whether the undertaking contained in it subsisted after the decision by PKNS to reject the transfer of the land to the plaintiff.

Held, allowing the plaintiff's claim with costs:

(1) The SPA between the plaintiff and MAP was a complete written agreement executed by both parties and was therefore valid. If there was anything murky about the SPA, the defendants could have expressed their dissatisfaction but they never did. It was clear from the defendants' actions at the time when PKNS rejected the transfer and then dismissed the appeal against that decision that the defendants wanted to be bound by the terms of the SPA. In fact there was not a shred of evidence adduced by the defendants that there was no consensus ad idem on the substantive terms of the agreement. On the other hand there was overwhelming evidence adduced in the course of the hearing that parties knew what they were doing, with their intentions being adequately reflected in the SPA (see paras 31 & 33).

(2) The undertaking that MAP would obtain the consent of PKNS for the transfer of the land to the plaintiff was an absolute and unqualified undertaking to obtain consent and not a limited undertaking to apply for consent. It had been proven that the defendants who were people of standing had signed the SPA which contained the undertaking, and the defendants had admitted in their statement of defence that consent in principle had been obtained. In addition, the plaintiff's director had testified that the vendor's agent had represented that consent in principle had been obtained by the defendants. However, despite

admitting that the vendor's agent was their agent prior to the determination of the contract, no good reason was supplied by the defendants as to why this agent was not called as a witness at the trial. In addition, whilst continuously asserting that the solicitor was immoral in the way the SPA was worded, no evidence was adduced to establish alleged misconduct by the solicitor (see paras 34–35).

(3) From the outset it was obvious that the defendants as seasoned and highly educated people knew in advance that consent must first be obtained from PKNS if the contract was to be successfully completed. Therefore, once having given that absolute undertaking, if consent was withheld for some good reason, the defendants had to be held responsible for the assumption of that risk and must pay for its acceptance. Even though it was obvious that the SPA was a conditional contract with an absolute and unqualified undertaking to obtain the consent from PKNS, the defendants must be held accountable for its failure. Adequate compensation must follow for any loss suffered by the plaintiff, as the aggrieved party (see paras 40 & 43).

(4) The granting of a specific performance order would be inappropriate in the light of the land now being issued with a new title and consent having to be obtained from the state authorities, rather than PKNS. An injunction would also not be suitable in this case. Damages would be most suitable and the loss would be the market value of the property at the contractual time for completion less the contract price had the contract been concluded. In calculating the damages the date of breach by the defendants would be the date when PKNS eventually rejected the plaintiff's appeal ie 28 August 1991. Hence the computation of the interest should begin from 29 February 1991 to the date of judgment. The plaintiff's further claim for damages was disallowed because the plaintiff had not taken any steps to mitigate its losses (see paras 44–46 & 49).

[Bahasa Malaysia summary

Pada 30 Januari 1986, Malaysian Association of Productivity ('MAP') telah membeli sebidang tanah yang terletak di Seksyen SS 6 ('tanah tersebut') daripada Perbadanan Kemajuan Negeri Selangor ('PKNS'). Semasa jualan itu MAP dan PKNS bersetuju bahawa kuasa kerajaan negeri diperlukan untuk pindah milik seterusnya ke atas tanah tersebut. Berikutan itu MAP telah menandatangani perjanjian jualbeli ('PJB') untuk menjual tanah tersebut kepada plaintif, sebuah syarikat yang memberikan khidmat penjagaan kejururawatan, pada harga RM503,569. Perjanjian tersebut termasuklah akujanji bahawa MAP akan memperoleh persetujuan PKNS untuk pindah milik tanah tersebut kepada plaintif. Bahkan sebelum menandatangani PJB

tersebut, MAP dan plaintif telah menyempurnakan surat tawaran yang disediakan oleh ejen estet MAP ('ejen penjual') yang menetapkan, antara lain, bahawa kelulusan untuk jualan diperlukan daripada PKNS. Selanjutnya, apabila plaintif membuat sebahagian daripada bayaran deposit 10% itu ejen penjual telah mengeluarkan resit kepada plaintif yang termasuklah fasal 'subject to PKNS approval and the execution of the SPA'. Berikutan itu MAP telah menulis kepada plaintif menyatakan bahawa PKNS tidak meluluskan pindah milik tanah tersebut kepada plaintif dan bahawa urusan antara plaintif dan MAP ditamatkan secara rasmi. Penamatan ini ditolak oleh plaintif, yang kemudian telah memberi notis bahawa MAP hendaklah menggunakan semua remedi yang sedia ada untuk memenuhi akujanjinya. Meskipun beberapa rayuan dibuat oleh plaintif dan ejen penjual terhadap keputusan PKNS, PKNS tetap dengan keputusannya. Pada masa yang sama plaintif mendapat tahu bahawa PKNS telah meluluskan pindah milik tanah tersebut kepada Angkasa dengan syarat bahawa tanah tersebut adalah untuk tujuan keinstitusian sahaja. Plaintif kemudian telah memfailkan guaman ini terhadap pemegang-pemegang jawatan MAP sebagai defendan-defendan menurut s 9(c) Akta Persatuan 1966. Plaintif memohon untuk pelaksanaan spesifik dan/atau ganti rugi dan injunksi. Dalam pembelaan mereka defendan-defendan menegaskan bahawa PJB tersebut merupakan kontrak bersyarat di mana persetujuan untuk jualan/pemindahan terletak pada budi bicara mutlak PKNS dan bahawa ianya sia-sia untuk merayu kepada PKNS. Defendan-defendan selanjutnya menghujahkan bahawa PJB tersebut tidak sah kerana ia dikatakan telah disediakan oleh seseorang yang tidak diberikan kuasa dan bahawa tambahan kepada PJB tersebut juga tidak sah dan bahawa MAP hanya berjanji untuk memohon untuk persetujuan. Plaintif juga telah memohon dan diberikan injunksi interim menyekat MAP daripada berurusan dengan tanah tersebut sementara menunggu guaman sivil selesai. Semasa perbicaraan pengarah plaintif memberi keterangan bahawa ejen penjual telah menerangkan secara lisan yang persetujuan prinsipal telahpun diperoleh daripada PKNS untuk menjual tanah tersebut kepada plaintif untuk mendirikan pusat penjagaan dan bahawa persetujuan bertulis daripada PKNS hanya formaliti. Sebaliknya saksi-saksi defendan-defendan menafikan telah menerangkan bahawa MAP telahpun memperoleh kelulusan PKNS secara prinsipnya berkaitan jualan tanah tersebut kepada plaintif. Walau bagaimanapun, ejen penjual tidak dipanggil untuk memberi keterangan tentang representasi kepada pengarah plaintif dan defendan-defendan menghujahkan bahawa ejen penjual telah menjadi ejen plaintif setelah penentuan PJB tersebut. Isu-isu di hadapan mahkamah dalam kes ini adalah sama ada PJB tersebut sah dan jika sah sama ada akujanji di dalamnya wujud selepas keputusan PKNS menolak pindah milik tanah tersebut kepada plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) PJB antara plaintif dan MAP merupakan perjanjian bertulis yang lengkap disempurnakan oleh kedua-dua pihak dan oleh itu adalah sah. Jika terdapat sebarang kekaburan tentang PJB tersebut, defendan-defendan seharusnya menyatakan ketidakpuasan mereka tetapi mereka tidak berbuat demikian. Jelas daripada tindakan defendan-defendan pada masa PKNS menolak pemindahan tersebut dan kemudian menolak rayuan terhadap keputusan itu bahawa defendan-defendan ingin terikat dengan terma-terma PJB tersebut. Bahkan tiada langsung keterangan yang dikemukakan oleh defendan-defendan bahawa tiada kaitan ad idem atas terma-terma penting perjanjian. Sebaliknya terdapat banyak keterangan yang dikemukakan semasa perbicaraan bahawa pihak-pihak mengetahui apa yang mereka lakukan, dengan niat mereka yang digambarkan dalam PJB tersebut (lihat perenggan 31 & 33).

(2) Akujanji bahawa MAP akan memperoleh persetujuan PKNS untuk pindah milik tanah tersebut kepada plaintif merupakan akujanji mutlak dan tidak bersyarat dan bukan akujanji yang terhad untuk memohon persetujuan. Ia telah dibuktikan bahawa, defendan-defendan yang berpelajaran tinggi telah menandatangani PJB tersebut yang mengandungi akujanji itu dan defendan-defendan telah mengakui dalam pernyataan pembelaan mereka bahawa persetujuan secara prinsipnya telah diperoleh. Tambahan pula, pengarah plaintif memberi keterangan bahawa ejen penjual telah menerangkan bahawa persetujuan secara prinsipnya telah diperoleh oleh defendan-defendan. Tetapi, meskipun telah mengakui bahawa ejen penjual merupakan ejen mereka sebelum penentuan kontrak itu, tiada sebab yang kukuh diberikan oleh defendan-defendan mengapa ejen ini tidak dipanggil sebagai saksi semasa perbicaraan. Tambahan lagi, semasa berterusan menegaskan bahawa peguam tidak bermoral dalam mana PJB tersebut disuratkan, tiada keterangan telah dikemukakan untuk membuktikan dakwaan salah laku oleh peguam itu (lihat perenggan 34–35).

(3) Dari awal adalah jelas bahawa defendan-defendan sebagai orang berpelajaran dan berpengalaman sedia maklum bahawa persetujuan perlu diperoleh terlebih dahulu daripada PKNS jika mahu kontrak disempurnakan dengan jayanya. Oleh itu, setelah memberikan akujanji mutlak itu, jika persetujuan tidak diberikan atas sebab-sebab yang wajar, defendan-defendan perlu bertanggungjawab dengan andaian risiko tersebut dan perlu menanggung akibatnya. Meskipun ia jelas bahawa PJB tersebut merupakan kontrak bersyarat dengan akujanji mutlak dan tidak bersyarat untuk memperoleh persetujuan daripada PKNS, defendan-defendan hendaklah dipertanggungjawabkan atas

kegagalannya. Pampasan sewajarnya perlu diberikan untuk apa-apa kerugian oleh plaintif, sebagai pihak yang terkilan (lihat perenggan 40 & 43).

(4) Memberikan perintah pelaksanaan spesifik tidak sesuai untuk tanah tersebut yang kini diberikan hak milik baru dan persetujuan perlu diperoleh daripada pihak berkuasa kerajaan negeri, dan bukan PKNS. Injunksi juga tidak sesuai dalam kes ini. Ganti rugi lebih sesuai dan kerugian perlulah mengikut nilai pasaran hartanah mengikut masa siap kontrak ditolak dengan harga kontrak jika kontrak disempurnakan. Dalam mengira ganti rugi, tarikh pelanggaran oleh defendan-defendan adalah tarikh apabila PKNS akhirnya menolak rayuan plaintif iaitu 28 Ogos 1991. Justeru itu pengiraan faedah patut bermula dari 29 Februari 1991 sehingga tarikh penghakiman. Tuntutan plaintif selanjutnya untuk ganti rugi tidak dibenarkan kerana plaintif tidak mengambil apa-apa langkah untuk memitigasikan kerugiannya (lihat perenggan 44–46 & 49).]

Notes

For cases on agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4791–4795.

Cases referred to

Central Malaysia Development Co Ltd v Chin Pak Chin [1967] 2 MLJ 174, HC (refd)

Finmark Consultants Pte Ltd v Development & Commercial Bank Bhd [1994] 3 MLJ 192, SC (refd)

Heller Factoring Sdn Bhd v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153, CA (refd)

Kin Nam Development Sdn Bhd v Khau Daw Yau [1984] 1 MLJ 256, FC (refd)

Lim Keng Siong & Anor v Yeo Ah Tee [1983] 2 MLJ 39, FC (refd)

Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors [2008] 2 MLJ 256, CA (refd)

Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd [2005] 4 MLJ 101, CA (refd)

T Damodaran v Choe Kuan Him [1979] 2 MLJ 267, PC (refd)

Legislation referred to

Legal Profession Act 1976 s 37(2)(a)
Societies Act 1966 s 9(c)

Suriyadi J:

[1] Yuny-Li Home Care Sdn Bhd (Yuny-Li) ie the plaintiff is a company

that provides nursing care for the disabled and the elderly. The Malaysian Association of Productivity or Persatuan Daya Pengeluaran Negara Malaysia (PDPM) (interchangeably MAP or the first defendant) is registered under the Societies Act 1966, with the individuals named also as defendants ('other defendants') in the suit being office-bearers of MAP. Where appropriate cumulatively they shall be referred to as defendants.

[2] The suit came about as MAP sold a piece of land described as Lot No 1, Jalan SS 6/3, Section SS 6 ('the land') to the plaintiff. The sale and purchase agreement was executed on 14 March 1989 (the second SPA or exh P5), with the land being sold at a price of RM503,569. An undertaking was included which stated that MAP would obtain the consent of PKNS for any transfer to be allowed. After a scrutiny of the evidence and the pleadings, and with all the concessions, amendments and issues suggested by both parties thrown in, and even though the issues are intertwined these questions nonetheless must be answered, viz.:

(1) was the second SPA valid at the outset;

(2) if valid, was the undertaking that was inserted of such a nature, that the contract still subsisted, even though by 1991 rejection of consent of PKNS was a certainty; and

(3) if the contract ended when refusal of consent was a certainty by 1991, how then is the plaintiff to be compensated, and if damages are to be ordered, for what length of period?

[3] In the course of the trial, bundles of documents and loose documents were tendered as exhibits though loose copies were not included in any of them. The documents referred to at the trial are as follows:

(1) Bundle A — 'Ikatan Dokumen A (dokumen yang dipersetujui atas kewujudan dan kandungan)';

(2) Bundle B — 'Ikatan Dokumen B (dokumen yang dipersetujui atas kewujudan sahaja (kandungan dipertikaikan))';

(3) Bundle C — 'Ikatan Dokumen C (dokumen yang tidak dipersetujui)' — however, parties have agreed to dispense with the original copies of documents in Bundle C;

(4) Bundle E — 'Ikatan pliding';

(5) Bundle F — 'Ikatan pliding tambahan';

(6) G — Statement of agreed facts;

(7) H — Statement of agreed issues to be tried;

(8) Bundle J — 'Ikatan dokumen tambahan defendan-defendan';

(9) Bundle K — 'Ikatan dokumen tambahan defendan-defendan'; and

(10) Bundle L — 'Ikatan dokumen tambahan plaintif (2)'.

[4] In the course of the hearing the plaintiff called three witnesses to testify viz Molly Cheah Bee Li (PW1) a director of the plaintiff, Cheah Cheng Hoc (PW2), an advocate and solicitor of the High Court of Malaya and Choy Yue Kwong (PW3), a registered valuer. The defendants called eight witnesses to testify viz Kanisah Saabin (DW1) who is the Pengurus Kanan Hal Ehwal Tanah of PKNS, Soh Ah Kow @ Soo Cheong Futt (DW2) a former trustee of MAP and initially named as the third defendant in the suit, Tan Sri Datuk (Dr) Hj Arshad Ayub (DW3) the President of MAP from 1982–1997, Datuk Nik Abd Rashid bin Nik Idris Ismail (DW4) who was the Vice President of MAP for the period 1979–1983 and who thereafter continued to be a member of MAP's Central Management Committee, Khaeruddin Sudharmin (DW5) the Secretary General of MAP from 1988–1990, Ismail bin Abdullah (DW6) who was formerly one of the three trustees of MAP initially named as the second defendant in the suit, Adnan Mohd Ariff (DW7) formerly the Pegawai Kerja Kanan (Tanah) of PKNS and also the secretary to the Jawatankuasa Tanah and Hj Ahmad Hj Moidin (DW8) the current National President of MAP.

[5] By a sale and purchase agreement dated 30 January 1986 (the first SPA, exh P1), MAP purchased the land from the Selangor State Development Corporation/Perbadanan Kemajuan Negeri Selangor ('PKNS') at a price of RM375,541. At that time, the individual title for the land was yet to be issued. One of the clauses of the agreement, in particular cl 7 provides that:

> MAP shall not transfer, or assign the benefit rights title interest and duties or obligations under this agreement without the written consent of PKNS first had and obtained such written consent shall be given or refused at the sole and absolute discretion of PKNS.

[6] State authority's consent is required for subsequent transfers as reflected in para 3(iv) of the first schedule of the first SPA, which provides that it is a special condition of PKNS that:

> Tanah yang dimiliki ini tidak boleh ditukarmilik melainkan dengan kebenaran Pihak Berkuasa Negeri dengan syarat bahawa sekatan ini tidak akan berkuatkuasa terhadap pemindahmilik yang pertama daripada Perbadanan Kemajuan Negeri Selangor kepada bakal pembeli.

[7] Further to the above condition, the use of the land is subject to para 3(i) of the first schedule of the first SPA as required by PKNS that:

A Tanah ini hendaklah digunakan semata-mata untuk Institusi/Pejabat (*the land is to be used only for institutional purposes/office*).

[8] I now touch on the SPA between MAP and the plaintiff. As stated above a sale and purchase agreement dated 14 March 1989 (the second SPA or exh P5), for the land was executed between MAP and the plaintiff. The agreement states that the plaintiff purchased the land with the primary purpose of constructing its own building, to house a centre, and to provide services for the elderly. Since the second SPA was challenged, let us peruse a relevant passage from the minutes of MAP's Central Management Committee's meeting on 17 February 1989, found in Bundle K at p 5, and gauge whether the contract had its approval. This highly pertinent record reads:

Chairman Datuk Nik then read out the draft agreement to ensure that the terms are acceptable to both parties and is consistent with what was agreed upon earlier.

The meeting also resolves to accept the contents of the draft agreement and accept changes to the signatories which in actual fact, must be done by MAP's trustees …

The meeting also resolves to approve the sale of the land … to Yuny-Li … under the terms & conditions as laid out in the said agreement.

[9] As regards the above minutes DW3 had testified:

… whatsoever said and done by MAP is contained in the permanent record of the 2 meetings of the Central Management Committee held on 13.1.1989 and 17.2.1989 found in Bundle K.

[10] DW4 confirmed DW3's earlier testimony that the draft agreement referred to in the minutes is the second SPA. When examined further DW4 said:

Q5: See Bundle K pages 4–6. This purports to be minutes of MAP's meeting on 17.2.1989. See paragraph 2.1. Do you agree that MAP agreed to accept the contents of the draft agreement with one change i.e. to change the signatories of MAP to be the trustees of MAP?

A: Yes.

[11] From the above it is clear that the second SPA had the approval of MAP from the very outset.

[12] One of the clauses, which took much of the court's attention is an undertaking given by the defendants to the plaintiff. Paragraph (b)(i) of the addendum to the second SPA provides that:

MAP undertakes to … Obtain consent of PKNS/State Authority for this sale to Yuny-Li or Yuny-Li's nominee(s). A

[13] We shall touch on this issue later in detail.

B

[14] The supplemental peripheral story that unfolded was that PW1 had always been dealing with one Khatijah Abdullah (Khatijah) of City Harta 1, in relation to the purchase of the land. There was sufficient admission and confirmation by the defendants that MAP had been negotiating the terms of the second SPA with the plaintiff through City Harta 1 which was its estate C agent. It was admitted by DW4 in no uncertain terms that Khatijah, who worked for City Harta 1, was the agent for MAP. It is undeniable that prior to the signing of the second SPA, MAP and the plaintiff had on 23 January 1989 executed a letter of offer prepared by City Harta 1 and issued under City Harta 1's letterhead. Amongst others, it stipulated that approval for the D sale was required from PKNS. In fact on 2 February 1989, when City Harta 1 issued to the plaintiff a receipt for RM10,000, it had the words 'being part payment for the 10% deposit for purchase of Lot No 1 SS 6/3, Kelana Jaya from MAP, (subject to PKNS approval and the execution of the sale and purchase agreement)' imprinted on it. On 20 February 1989, City Harta 1 E issued to the plaintiff another receipt for RM40,357. The following words 'being balance/full payment for the 10% of the down payment/deposit for purchase of Lot No 1 SS 6/3, Kelana Jaya, Selangor from MAP made up by KYBB No 835941 in the name of PKNS for sum of $37,554.10 and D & C Bank No 738792 for sum of $2,802.90 to City Harta 1,' were also written F on that receipt.

[15] Evidentially, PW1 had testified that she was concerned that the land would not be sold to the plaintiff to build a nursing home, unless consent was G obtained from PKNS. On the other hand, Khatijah assured her that:

(a) MAP had no choice but to sell the land due to its financial difficulties. MAP had not paid the salaries for its lecturers and also the contribution to the Employees' Provident Fund;

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(b) MAP's then national president ie YB Tan Sri Dato' (Dr) Arshad Ayub was the retired chief secretary to the government and that he already had obtained the consent in principle from PKNS to sell the land to the plaintiff to set up a nursing home to help MAP overcome its financial difficulties; and

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(c) the written consent from PKNS was only a matter of formality and could be obtained within a short period of time from the date of submission of a formal application. (I had adjudged that the above statements were admissible in the course of the hearing).

[16] During the cross-examination, PW1 reiterated that Khatijah did represent to her that MAP had obtained the consent in principle. PW2 testified that PW1 instructed him of this representation as gauged from the following evidence:

> It was not a written consent but only what my client understood from the dealings with City Harta 1 that PKNS had given their consent in principle. It was still subject to an application for a formal consent from PKNS. That was why the Vendor undertook to obtain the formal consent.
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> Other than the 1st letter from City Harta (A54) orally she told me her conversation with Khatijah Abd. i.e. vendor's agent that consent from PKNS had been obtained in principle.
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> … my client instructed me that she understood from the vendor's agent that consent in principle had been obtained prior to the execution of the agreement. The undertaking in the Agreement (para 2) is to entrench the formal consent.
>
> I said, I drafted a S & P on the instruction of my client and perusal of certain types of document, relevant document. It was the oral instruction of the client that the vendor defendant had already obtained the consent of PKNS in principle. It could be oral. I didn't go into it. That was enough or assume both parties that the formal consent from PKNS as required by documents would not be a problem. That was why when S & P executed the vendor undertook to take the consent (see pg. 14C). The vendor undertakes to …
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> The clause/undertaking is wide enough to cover all necessary consent required because all the parties were aware at pg. 13 Condition there that the consent of 'pihak berkuasa negeri' is required.

[17] During the hearing, DW3 denied having represented that MAP already had obtained the approval of PKNS in principle pertaining to the sale of the land to anyone. Likewise, DW4 and DW5 too denied such representation. This piece of evidence would conflict with its statement of defence. This matter could easily have been resolved if Khatijah, the agent for the defendants, had been called to testify pertaining that representation to PW1. Regretfully she was not. No cogent reason was supplied why she was not subpoenaed, except to state that at the initial stages she was their agent, but not after the determination of the contract. The defendants then, in a novel way, ventilated that after the determination of the second SPA she became the plaintiff's agent and hence shifting the responsibility to the latter to have her called. I find this approach bordering on desperation when their own witnesses admitted that City Harta 1 was their agent. It must be appreciated too that the defendants made the representation before the determination of the contract, and if going by their evidence, ie she was their agent at that stage, that responsibility had yet shifted.

[18] Returning to the agreement, the evidence adduced showed that the plaintiff executed an application form dated 15 March 1989 entitled 'Permohonan Tanah Perbadanan Di Kawasan Lot 1, Jalan SS6/3, Kelana Jaya, 47301 Petaling Jaya, Selangor' (exh P6). In compliance with the second SPA payments were required to be made. Pursuant to cl 3(a) of the agreement read together with sections 8 and 9 of the schedule, the plaintiff was liable to pay the balance purchase price of RM453,212 to Messrs Megat Najmuddin Leong & Co within three months from the date of the second SPA, unless the period was extended.

[19] The plaintiff testified that, based on the assurance that consent had been obtained it agreed to pay 10% of the purchase price on or before executing the sale and purchase agreement, with the balance of 90% of the purchase price to be paid within three months of executing it. With PKNS' failure to give its written consent within two weeks from the date of submission of the application by the plaintiff it thus could not obtain a bank loan. Due to that failure, the plaintiff asked MAP to revise the deadline for payment to three months from the date of the consent from PKNS. PW1 also testified that Khatijah told her to formally write in to request for the variation. On 4 April 1989, the plaintiff's solicitors wrote to City Harta 1 (exh P7), stating that the plaintiff could not apply for a bank loan without PKNS's consent and requested revising the completion date to read as three months from date of consent being obtained from PKNS. A reply did come, wherein as per letter dated 8 June 1989 (exh P9), a two months extension was granted, that was from the date of consent from PKNS for sale.

[20] On 8 July 1989, PKNS issued a letter addressed to MAP with a copy to the plaintiff, informing it that the application for the transfer of the land from MAP to the plaintiff was unsuccessful. Being dissatisfied PW1 had spoken to Khatijah about it. Khatijah said that it was quite normal for the first application to be rejected whereupon advised MAP and the plaintiff to put up separate letters of appeal against the decision. The plaintiff wrote several letters to City Harta 1 to ask MAP to appeal to PKNS against the said decision. City Harta 1 responded that it had requested MAP to appeal against the said decision and similarly suggested the plaintiff to lodge an appeal. Pursuant to that advice the plaintiff filed an appeal to PKNS vide letter dated 3 October 1989.

[21] Vide its letter dated 7 May 1990 MAP wrote to City Harta 1 (exh D53) stating of PKNS's rejection of the proposed sale. It also stated that as the second SPA was subject to approval from PKNS and that consent was not forthcoming the deal with the plaintiff was thus officially terminated. City Harta 1 later faxed a copy of the letter to the plaintiff's solicitors sometime in early June 1990. This termination was rejected vide the plaintiff's

A solicitors' letter to City Harta 1 dated 22 June 1990, and gave notice that MAP must exhaust all remedies available to them to fulfil its undertaking. The plaintiff also submitted an appeal to PKNS, and had written in to City Harta 1 on 5 July 1990, requesting MAP to support that appeal. Reminders by the plaintiff to the PKNS received no response.

B

[22] The plaintiff testified that before PKNS decided on its appeal MAP was already in negotiations with Angkatan Koperasi Kebangsaan Malaysia Bhd (Angkasa), for the sale of the land. By 6 July 1990, Angkasa and MAP had already agreed that the purchase price for the land be at RM549,348, which was about 9% higher than the purchase price, agreed upon with the plaintiff.

C

[23] The evidence adduced showed that in compliance with the required conditions, MAP and Angkasa had submitted a signed joint application to PKNS, entitled 'Permohonan Kebenaran Memindah Hakmilik Tapak Perindustrian/Tapak Perdagangan' dated 14 August 1990. On 28 February 1991, PKNS wrote to MAP and carbon copied the letter to Angkasa informing it that PKNS had dismissed the plaintiff's appeal, detailing that the Jawatankuasa Mesyuarat had rejected the appeal's application. PKNS at the same time had approved the transfer of the land to Angkasa on condition that the land was for institutional purposes only.

D

E

[24] PW1 had evinced that in early March 1991, Khatijah told her that the defendants were attempting to sell the said land to Angkasa. Her solicitors then wrote to City Harta 1 stating that the plaintiff's appeal to the PKNS was still outstanding, with any attempt to dispose the land to a third party constituting a breach of undertaking. On 19 March 1991, City Harta 1 wrote to the plaintiff saying that letters written by the plaintiff to City Harta 1 had been forwarded to MAP and that the latter had been advised to appeal, though admitting that it had no knowledge whether MAP had filed an appeal.

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G

[25] The plaintiff through its solicitors had demanded (exh P24) that MAP perform its undertaking to obtain consent from PKNS. In the letter of demand the plaintiff too complained of City Harta 1's inability to persuade MAP to secure the necessary consent from PKNS as per the undertaking.

H

[26] On 24 April 1991 the plaintiff filed the present suit. The then four office-bearers of MAP, amongst them YB Tan Sri Dato' (Dr) Arshad Ayub (DW3), were included as defendants (he being the then National President of MAP) pursuant to s 9(c) of the Societies Act 1966. This section reads:

I

a society may … be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society;

[27] The plaintiff had prayed for specific performance of the second SPA and for an injunction or in the alternative, damages in lieu of specific performance in the original statement of claim. It subsequently amended the statement of claim to rephrase the prayer for specific performance and/or damages and injunction. The defendants elaborated on its earlier defence that the second SPA was a conditional contract with consent for the sale/transfer at the 'sole and absolute discretion' of PKNS and it was futile to appeal to PKNS. MAP also raised new defences, amongst others that the second SPA was void, being allegedly prepared by an unauthorised person and hence in breach of s 37(2)(a) of the Legal Profession Act 1976, the addendum to the second SPA was void, and that MAP merely undertook to apply for consent. However, the court when giving leave to amend the defence did not allow MAP to withdraw its earlier admissions and stand taken in the original statement of defence. The admissions in brief, amongst others pertained to its admission that the plaintiff agreed to enter the second SPA upon representation that MAP had already obtained consent in principle from PKNS to transfer or sell the land, and that City Harta 1 was MAP's agent.

[28] The chequered saga continued when on 8 May 1991, the learned High Court judge granted an interlocutory injunction in favour of the plaintiff restraining MAP or its agents from, inter alia, transferring, selling or dealing with the land pending trial. This order was later amended. With the land being issued with an individual title on 17 April 1993, any appeal filed by the defendants would be to no avail (exh D62). On or about 22 November 2000, one Fairview Development Sdn Bhd ('Fairview') lodged a private caveat on the land in order to protect its interests since it had entered into a joint venture agreement with MAP on 28 May 1997. A second caveat was registered when the earlier one lapsed. On or about 12 January 2001, one Kooperasi Jimat Cermat Dan Pinjaman Mercantile Berhad ('Kooperasi') likewise lodged a private caveat on the land though subsequently withdrew it on 8 February 2007.

CONCLUSION

[29] Having perused the evidence I am satisfied that the second SPA is valid. If a contract made orally is valid and binding, despite the formal agreement not yet executed, it stands to reason that a completely executed

A one will be unimpeachable (*Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39). The Federal Court remarked:

> … it was the intention of the parties to come to a definite and complete agreement on the subject of the sale and the mere fact that a written contract had to be drawn
B up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement.

[30] In fact a contract signed by only one party is valid and binding if the other party has elected to be bound by it. In *Heller Factoring Sdn Bhd v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153, Mahadev Shankar JCA at p 174 said:

C

> It was strenuously submitted that because Matang had not dated or signed this document, there could be no concluded contract. We are unable to subscribe to
D this view. The true position is that where a contract has been signed by one party only, it can be enforced where there is evidence that the other party has elected to be bound by it. … Part performance by one party, accepted by the other, is such other evidence.

E

[31] As both parties had signed the second SPA how then could it be said that the defendants did not want to be bound by the agreement? The notes in the meeting MAP on 17 February 1989 clearly reflected its intention to enter the contract with all the admitted terms and eventually crystallised in
F the agreement. The fact that subsequent to the execution of the second SPA, MAP on 8 June agreed to the plaintiff's request to vary the terms of payment set out in the second SPA (to be paid within two months), it must be taken to be additional evidence of its election to be bound by it. If there was anything murky about that SPA, at this advanced stage the defendants could
G have expressed their dissatisfaction, but this they never did. The feverish subsequent actions, even after PKNS had rejected the transfer on 8 July 1989 and its dismissal of the appeal on 28 February 1991 until the last vestige of hope died on 17 April 1993 when a separate title was issued, established
H beyond doubt that MAP wanted to be bound by the terms of the second SPA.

[32] The defendants are not ordinary people but personalities who are highly educated, highly placed, and highly motivated. As expressed by DW5 in open court, when answering the charges of contempt, he defiantly said that
I he was willing to go to jail for the sake of MAP and its agenda.

[33] To wind up on the validity of the second SPA there is not a shred of evidence adduced by the defendants to establish that there was no consensus ad idem on the substantive terms or the agreement. In fact the reverse is true,

as there is overwhelming evidence adduced in the course of the hearing that parties knew what they were doing, with their intentions being adequately reflected in that written document.

[34] I now touch on the undertaking. Having scrutinised the relevant provision pertaining to it I am satisfied that it must be construed as an absolute and unqualified undertaking to obtain consent; it is not a limited undertaking to apply for consent. Regardless of the denials by the defendants, these following facts would make short shrift of the defendants' arguments:

(a) the second SPA contained the undertaking;

(b) the defendants signed the second SPA;

(c) the defendants and their counsel were at pains to emphasise of MAP's dire financial predicament (Evidentially the desperate financial predicament of MAP made it more than probable that they have assured the plaintiff that consent had been obtained or it could guarantee that consent);

(d) the statement of defence admitted that consent in principle had been obtained (The confidence thus was overflowing and must accept all the consequences that flow from that representation and guarantee).

(e) the defendants through their counsel have continuously admitted that they were people of standing and being highly educated (they could not have signed the SPA with their minds and eyes closed); and

(f) PW1 has testified of the representation on the issue of consent and PW2 has affirmed her evidence (there is consistency in their evidence).

[35] To the detriment of the defendants, there were some serious flaws in the conduct, approach and manner of handling of their defence eg even though admitting Khatijah as their agent prior to the termination of the second SPA, no good reason was supplied why she was not called. As regards their continuous assertion that PW2 was immoral in the way the second SPA was worded, not a shred of evidence was adduced to establish that alleged misconduct, or for that matter of any semblance of fraud. What with the words alluded to in the agreement being simple, succinct and not difficult to interpret, the court must enforce it as executed. It is a canon of construction of contract that a term must be construed based on its ordinary and literal meaning when there is no ambiguity in the wordings of the term. *Chitty on Contracts*, Volume 1, General Principles, (26th Ed), para 812 authored:

> *Adoption of the ordinary meaning of words*. As the meaning to be put on a contract is that what is plain, clear and obvious result of the terms used therein, so these terms are 'to be understood in their *plain, ordinary, and popular sense* … (Emphasis added.)

[36] See also *Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256, where the Court of Appeal opined:

> It is also quite established that when interpreting the meaning of the words used in a contract they should be construed in their *grammatical and ordinary meaning*, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy (*The Interpretation of Contracts* by Kim Lewinson, Sweet & Maxwell 1989). (Emphasis added.)

[37] Additional to the above, the defendants' counsel, in the course of the submission had ventilated that if this undertaking were accepted as valid, it must be understood as a guarantee given by the defendants in that the consent would be obtained no matter what. Surely any failure to satisfy it would lead to financial consequences. Verbatim counsel for the defendants conceded as per the notes of proceedings:

> Mr Joginder: I concede, 'vendor undertakes to obtain consent', as in C14 means in law he guarantees consent. MAP is bound to get consent even if outside its control under the S & P.

[38] The above concession is in line with *Finmark Consultants Pte Ltd v Development & Commercial Bank Bhd* [1994] 3 MLJ 192, where Peh Swee Chin SCJ at pp 205–206 had occasion to make certain pertinent remarks. He opined that a vendor by agreeing to deliver 'the memorandum of transfer, issue document of title for registration in favour of the purchaser free from all encumbrances by 30 December 1989' without a 'force majeure clause to excuse performance by the vendor on account of any extraneous event obstructing the performance with the vendor having no control at all over such event and through no fault of the vendor' had made '*an unqualified or absolute promise*', and accepted 'the risk of the performance of that promise becoming impossible through no fault of his own'.

[39] In *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd* [2005] 4 MLJ 101, the Court of Appeal, when discussing the respondent's undertaking of the approval for the sale and purchase of the land, subject to and upon the terms and conditions, remarked:

> We have read this clause very carefully and it is our finding that the undertaking given by the respondent is in respect of obtaining the approvals of both its own shareholders and that of Brisdale Holdings Bhd, its holding company. The undertaking given by the respondent is plain and clear and there is no ambiguity. It is an undisputed fact that both parties in this case had legal representation in the drafting of the agreement and the respondent had given this express undertaking with the benefit of legal advice. The respondent cannot now resile from this undertaking so given to the appellant. In the *Central Bank of India Ltd Amritsar v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288 it was said:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. *The court must give effect to the plain meaning of the words* however much it may dislike the result. (Emphasis added.)

[40] From the facts it was obvious that the defendants had undertaken to obtain the consent even though they knew a third party held that authority to give or withhold it. These seasoned and highly educated people knew well in advance that consent must be obtained first from PKNS if the contract were to be successfully completed. Whether it was sheer desperation or over-confidence on their part, but with their eyes open, that led to the absolute undertaking having been given and (without an escape chute), there was every possibility that the consent could be withheld for some good reason. If that occurs the defendants is to be held responsible for the assumption of that risk and thus must pay for its acceptance.

[41] Suffice if I merely refer to some views uttered by eminent judges regarding the issue of assumption of risk. In *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267, the Privy Council (per Lord Diplock) at p 268 said:

> The terms of the solicitor's undertaking are *clear, unqualified and unequivocal*. The event on the happening of which the money was to be paid took place on April 16 1974, when the transfer of the lands was 'duly registered in the name of the purchaser Messrs Syarikat Alor Merah Sdn Bhd'. The failure to pay the balance of $182,200 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on July 30 1974, by originating summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of $182,200 with interest from April 16 1974.
>
> The solicitor knew of the entry on the register of the lis pendens order on March 6 1974. Nevertheless on that day *he gave an unqualified undertaking* to pay over the balance of the purchase price to the vendor upon the transfer of the land being duly registered in the name of the purchaser. He may well have thought that either the lis pendens order, which had been obtained ex parte and was unprecedented in Malaysia in relation to land under the National Land Code, would be set aside when the application for that purpose came before the judge, or if it were not set aside, the transfer of the land to the purchaser would not be entered on the register. However this may be, *he took the risk*; the vendor was able to fulfil the condition; and Their Lordships agree with the dissenting judgment of Ali FJ *that there was nothing to justify depriving the vendor of an order for payment directly to him of the sum due under the undertaking*. (Emphasis added.)

[42] In *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256, Salleh Abas CJ (Malaya) at p 259 said:

> The booking was done and accepted before the land was sub-divided. There is no basis for the appellant to assume that its application for subdivision and conversion would be approved without conditions or even approved at all. It should have first waited for the decision of the Pahang State Government on the fate of its application before venturing to advertise and accept booking fees for the proposed subdivided lots. It is no defence for it to say that the special conditions were completely unexpected, because under the law the state government could even refuse the application altogether, if it was so minded. The appellant had no good reason to expect that its application would be approved at all. *As it took great risk so it must pay for it.*

[43] Construction of contract is the purview of the court, and not for the witnesses, or for that matter concessions made by counsel. Even though it is obvious that the second SPA is a conditional contract, and with the undertaking an absolute and unqualified one to obtain consent from PKNS, MAP here must be held accountable for its failure. Adequate compensation must follow in its wake for any loss suffered by the aggrieved party, in this case the plaintiff, caused by that breach. What is adequate would depend on the facts before the court.

[44] The plaintiff has prayed, inter alia, for specific performance, injunction and damages. In the light of the land now having been issued with a new title on 17 April 1993, and consent will have to be obtained from the state authorities, rather than PKNS, the granting of a specific performance order would be inappropriate. Injunction has no place here; damages would be most suitable, with the measure of damages depending on the losses suffered by the plaintiff. The loss would be the market value of the property at the contractual time for completion less the contract price had the contract been concluded (*Central Malaysia Development Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174).

[45] Since payment of the balance purchase price was varied and delayed to two months after consent of transfer has been obtained from PKNS, an event that never took place, my view is that the date of breach by MAP/cut of point has to be when PKNS eventually rejected the plaintiff's appeal on 28 February 1991. When the plaintiff filed the action on 24 April 1991 it was obvious that even the plaintiff had capitulated and accepted the termination of the agreement.

[46] The plaintiff has evinced that the measure of damages would be RM411,431 (ie RM915,000 less RM503,569) with interests at the rate of 8% pa from 29 February 1991 until one day before the date of judgment. **A**

[47] The defendants canvassed differently. They have complained that the above comparison was based only on one transaction to arrive at that price of RM915,000. The agreed purchase price by the plaintiff as stated in the SPA was RM503,779 whilst the agreed purchase price by Angkasa on 6 July 1990 was RM549,348. In his submission counsel for the defendants had suggested a sum of RM600,000 as at 28 February 1991. **B** **C**

[48] Having sieved the evidence I accept the reasonable suggestion by the defendants and reject the plaintiff's suggested price. The loss suffered by the plaintiff for the aborted contract would thus be ordered at RM96,221 (RM600,00–RM503,779) with interest of 8% beginning from 29 February 1991 to date of judgment. The sum of RM12,802.90 which has yet to be refunded to the plaintiff naturally must be paid back. **D**

[49] To explain the want of other damages, it was quite conspicuous as early as 8 July 1989, when PKNS wrote to MAP informing it of the rejection of the transfer, things were not moving the way parties had wanted. At that stage the plaintiff should have undertaken alternative measures and prepare for the worse. Come 7 May 1990 when MAP wrote to City Harta 1, that the contract had ended, the plaintiff still was determined to pursue the contract and never mitigated its losses. Despite the events, in the like of receiving the later letter of 28 February 1991, which stated that the plaintiff's appeal had been dismissed, followed by the subsequent filing of the suit, the plaintiff unreasonably, instead of seeking alternative sites had still refused to accept reality. Sticking to its proverbial gun, and refusing to give up hope, the plaintiff successfully applied for an injunction. Much of the action of the plaintiff, post 28 February 1991 thus, was a mirror image of the defendants conduct when the plaintiff abandoned all reasonableness by refusing to take mitigating measures and refusing to abandon the impossible claim for the land. Due to that unreasonable behaviour I have rejected any damages claim for any expenses incurred after 28 February 1991. **E** **F** **G** **H**

[50] To avoid any misunderstanding, the claim by the plaintiff has been successfully established and I thus order damages in the sum of RM96,221 with interest of 8% beginning from 29 February 1991 to date of judgment. **I**

A The sum of RM12,802.90 is to be refunded. No specific performance or injunction is ordered in the circumstances of the case. Costs is also ordered.

Allowing the plaintiff's claim with costs.

B

Reported by Kohila Nesan

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